

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9467

File: 20-534243 Reg: 14080113

7-ELEVEN, INC. and HUMBLE TREE CORPORATION,
dba 7-Eleven Store #2366-14184G
1711 159th Avenue, San Leandro, CA 94578-2076
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 2, 2015
Sacramento, CA

ISSUED APRIL 21, 2015

7-Eleven, Inc. and Humble Tree Corporation, doing business as 7-Eleven Store #2366-14184G (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for fifteen days because their clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Humble Tree Corporation, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kelly Vent.

¹The decision of the Department, dated July 30, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 30, 2013. Before then, 7-Eleven, Inc. and Li Lijun had been co-licensees since May 5, 2011. The only difference between the previous license and the current license is that Li Lijun created a corporate entity, Humble Tree Corporation,² to be a co-licensee with 7-Eleven, Inc. on the current version. The previous license has no disciplinary record.

On March 12, 2014, the Department filed an accusation against appellants charging that, on January 2, 2014, appellants' clerk, Billy Tam (the clerk), sold an alcoholic beverage to eighteen-year-old Rosemary Guerrero. Although not noted in the accusation, Guerrero was working as a minor decoy for the Alameda County Sheriff's Department (ACSD) at the time.

At the administrative hearing held on July 3, 2014, documentary evidence was received and testimony concerning the sale was presented by Guerrero³ (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises alone. She went directly to the beer refrigerators, selected a six-pack of Bud Light beer, and took the beer to the cash register area where there were some customers ahead of her. At that time, there were two employees working behind the sales counter, one male and one female. When it was the decoy's turn to be served, she moved to the sales counter and placed the beer on the counter; she was

²Li Lijun serves as President/Secretary of appellant Humble Tree Corporation.

³As noted in the Proposed Decision, Guerrero's surname was changed subsequent to her participation in the decoy operation on January 2, 2014. (See RT at p. 11.) To avoid confusion, we will refer to her as Guerrero, the name she used on the date of the operation.

then waited on by the male clerk. The clerk requested a copy of the decoy's identification, and the decoy produced a copy of her California Identification Card which contained her picture, her correct date of birth — 12/25/1995 — a red stripe indicating "AGE 21 IN 2016," and a blue stripe indicating "AGE 18 IN 2013." (Exhibit 3.) The clerk took possession of the identification and sold the beer to the decoy without asking for her age. The decoy and the clerk did not engage in any conversation other than to speak about the price of the beer. Following the sale, the decoy exited the premises.

Soon thereafter, the decoy re-entered the licensed premises to identify the clerk with three ACSD deputy sheriffs. The decoy saw the male clerk waiting on a customer, and she and the deputies proceeded to the sales counter. One of the deputies asked the decoy who sold her the beer, and the decoy pointed to the male sales clerk and said, "Yes, that's him," or words to that effect. The decoy was standing next to the deputies when one of them spoke with the clerk. She heard the deputy tell the clerk that he had sold beer to a minor, and the clerk did not deny doing so. The deputies moved the clerk to the rear of the store, and the decoy accompanied them. A photograph was then taken of the clerk and the decoy standing next to one another. (Exhibit 2.) Thereafter, the clerk was issued a citation.

The Department's decision determined that the violation charged was proved and no defense was established. The administrative law judge (ALJ) proposed, and the Department adopted, a penalty of fifteen days' suspension of appellants' license.

Appellants filed an appeal contending: (1) the Board must view the decoy in person in order to fulfill appellants' right to a review of the Department's rule 141(b)(2)⁴

⁴References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

findings; (2) the minor decoy operation violated rules 141(b)(2) and 141(a) because the Department used a decoy with two years of law enforcement training who was wearing makeup and expensive jewelry; and (3) the decoy's identification of the clerk violated rule 141(b)(5).

DISCUSSION

I

Appellants contend that the Board must view the decoy in person in order to fulfill appellant's statutory and constitutional right to a review of the Department's findings.

Appellants are simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415 and numerous subsequent cases. On or about February 9, 2015, counsel for appellants petitioned the Second District Court of Appeal for a writ of review of our decision in *Chevron*, specifically as it pertained to this issue. On April 2, 2015, following a brief stay, the Court entered a final order summarily denying the petition. As such, our position that this argument wholly lacks support in ether law or logic remains unchanged, and we expect *not* to see this argument again. Indeed, raising this same argument in the future before the Board will put counsel and/or the appellant in jeopardy of sanctions by the Board for a frivolous appeal.

II

Appellants contend the minor decoy operation violated rules 141(a) and 141(b)(2). They claim the decoy's experience with law enforcement, coupled with the fact that she wore makeup and expensive jewelry on the date of the sale, would have lulled even the most diligent clerk into believing the decoy is over the age of 21.

(App.Br. at pp. 9-10.) Specifically, as to the decoy's makeup and jewelry, appellant claims the decoy:

had penciled eyebrows, was wearing foundation, and had diamond studs in her ears when she went to Appellants' store on January 2, 2014. Her makeup was not loud and excessive, as might be expected of a teenager, but rather modestly done and gave her a respectable, mature appearance. (See State's Exhibit 2.) Further adding to the maturing effect of her makeup and experience, was her expensive jewelry — the diamond-stud earrings.

(*Id.* at p. 9.)

This Board is bound by the factual findings in the Department's decision, provided those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd. (2002)]* 100 Cal.App.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779];) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Rule 141(a) mandates that minor decoys only be used by the Department in a manner that promotes *fairness*:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to

minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Consistent with the spirit and letter of rule 141(a), rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense[.]

Rule 141 and its subdivisions constitute an affirmative defense, and the burden is on appellants to establish a prima facie case that there was not compliance. (See, e.g., 7-*Eleven, Inc./Samra* (2014) AB-9387, at p. 7.)

The Department adopted the following findings made by the ALJ concerning the decoy's overall appearance:

D. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty one years. No evidence was presented that her appearance was substantially different on the date of the decoy operation.

1. On the day of the sale and at the hearing, the decoy was 5 feet 8 inches tall. She weighed 110 pounds on January 2, 2014, but at the hearing she weighed 115 pounds. Guerrero wore a black v-neck shirt, grey sweater, and blue jeans during the decoy operation.

She has brown eyes and dark brown hair, which she wore pulled back on January 2, 2014. Guerrero has olive skin and her complexion is wrinkle free. The decoy applied foundation to her face on the date of the incident. She also has penciled eyebrows. However, she did not wear lip gloss or mascara during the decoy operation. At hearing, Guerrero wore mascara, foundation, powder, and lip gloss. Even with the additional make-up worn at hearing, the decoy is quite young looking. Guerrero did wear diamond stud earrings on the day of the operation. She wore no other jewelry.

Respondent Exhibit B is a photograph taken of Guerrero prior to going out into the field on the day of the operation. It accurately depicts what she looked like on January 2, 2014. A brown purse strap is visible in the photograph, but she did not carry a purse into the 7 Eleven [*sic*].

2. The decoy testified politely at hearing. She was quite soft-spoken. There was nothing remarkable about the decoy's nonphysical appearance

and there was nothing about the decoy's speech, mannerisms, or her demeanor that made her appear to be 21 years of age or older.

3. Guerrero participated in two decoy operations prior to this incident. The first operation was with the Alameda County Sheriff's office and she visited approximately 20 stores. The second operation was with the Union City Police Department and she entered about 12 stores. There was no evidence presented that Guerrero's prior experience as a decoy caused or contributed to the clerk selling an alcoholic beverage to her. The selling clerk did not testify at the hearing.

4. Prior to this decoy operation, Guerrero had two (2) years' experience as an Explorer with the Union City Police Department. Her training including studying the California Penal Code, learning the basics of pedestrian and vehicle stops, and participating in building searches. She assisted police officers in their duties.

As part of Guerrero's Explorer training, she received some instruction on how to be a minor decoy in undercover alcoholic beverage operations. Guerrero was told to act "normal" and to dress "her age." There was no evidence presented that Guerrero's prior training or experience as an Explorer caused or contributed to the clerk selling an alcoholic beverage to her. As previously noted, the selling clerk did not testify at the hearing.

5. After viewing the decoy's overall appearance when she testified, and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Findings of Fact, II.D.1-5.)

The ALJ considered appellants' rule 141(b)(2) arguments and expressly rejected them:

Respondents' [*sic*] argue that Rule 141(b)(2) was violated because of the decoy's physical appearance, to wit: she wore foundation, had penciled eyebrows, and she had diamond earrings. In addition, Respondents' counsel contends her prior experience as a decoy and as an Explorer made her appear 21 years of age or older, thereby violating the aforementioned rule.

The Court had the opportunity to observe the decoy at hearing, in addition to reviewing State's Exhibits 2 & 3 and Respondent Exhibit B, and concluded Guerrero displayed an overall appearance which could generally be expected of a person under the age of twenty-one years

under the actual circumstances presented to the seller at the time of the sale. [See Findings of Fact II]

Respondents' arguments are also conjecture since the selling clerk did not testify. The lack of evidence to support the Respondents' contention is a material failure of proof and no affirmative defense was established.

The Respondents' arguments lack evidentiary support and they have not met their burden of proof in establishing an affirmative defense.

There was compliance with Rule 141(b)(2) of Division 1, Title 4, California Code of Regulations as set forth in Findings of Fact II.

(Determination of Issues II.)

Appellants allege neither the insufficiency of the findings in the Department's decision nor the insubstantiality of evidence to support those findings, and they cite no authority to support their contention that the decoy's physical appearance, experience as an Explorer, jewelry, or makeup made her appear older. Indeed, the assertion that a decoy looked over the age of 21 simply because of prior law enforcement experience has been rejected by this Board *ad nauseam*, as has the contention that a decoy's makeup and jewelry make her appear older. (See, e.g., *Azzam* (2001) AB-7631; *7-Eleven, Inc./Johal Stores, Inc.* (2014) AB-9403, at p. 5 ["the fact that the decoy wore makeup has never been found by this Board to be justification for claiming the decoy appeared to be older than 21."]; *7-Eleven, Inc./Kaur* (2013) AB-9230 [refusing to overturn an ALJ's rule 141(b)(2) determinations although the decoy wore diamond stud earrings and light mascara.] Moreover, as noted by the ALJ, because the selling clerk did not testify, his impression of the decoy's appearance on the date of the sale is unknown, and any argument to the contrary is plainly conjecture.

Appellants' position is premised exclusively on a mere difference of opinion as to the ultimate conclusion that the evidence supports. Given the ALJ's meticulous and

detailed dissection of the various attributes of the decoy's overall appearance — which encompassed her height, weight, hairstyle, clothing, makeup, jewelry, law enforcement experience, speech, poise, mannerisms, and demeanor — and how they played into appellants' rule 141(b)(2) arguments, we do not, and indeed cannot, find any reason for the Board to substitute its judgment for his on this question of fact. As such, appellants' arguments on this point fail.

III

Appellants claim that the decoy's identification of the seller did not comply with the requirements of rule 141(b)(5) because there is no evidence that the selling clerk actually heard the decoy identify him to the officers. (App.Br. at p. 11.) Appellants maintain that because the clerk was assisting other customers at the time of the identification, the sales counter physically separated the decoy and the clerk during the identification, and the officers did not approach or speak to the clerk until after the identification, the evidence was insufficient to establish that the clerk was reasonably aware that the decoy was identifying him. (*Id.* at pp. 11-12.)

Rule 141(b)(5) states:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of alcoholic beverages.

In *Chun* (1999) AB-7287, the Appeals Board provided the following definition of "face to face" in the context of rule 141(b)(5):

[T]he decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *Greer* (2000) AB-7403, the Board made clear it is not necessary that the clerk actually be aware that the identification is taking place. (*Id.* at p. 4.) The only “acknowledgment” required is achieved by “the seller’s presence such that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller.” (*Chun, supra*, at p. 5, emphasis added.)

In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], the court said that there must be “strict adherence” to the provisions of rule 141. Appellants rely on this language to support their contention that such adherence was not achieved in this case. They claim that the physical separation — i.e., the sales counter — between the decoy and the clerk at the time of the identification, the fact that the clerk was helping other customers, and the fact that officers did not contact the clerk until after the identification was made, indicate that the identification did not proceed in the manner required by law.

The ALJ made the following findings concerning the identification:

C. Decoy Guerrero re-entered the 7-Eleven store with three deputy sheriffs to identify the selling clerk. She saw the male clerk waiting on a customer. They proceeded to the sales counter.

One of the deputies asked her who sold her the beer. Guerrero pointed to the male sales clerk and said, “Yes, that’s him,” or words to that effect. Guerrero was standing next to the deputies when one of them spoke to the selling clerk. Guerrero heard the deputy tell the clerk that he sold beer to a minor. The clerk did not deny selling the beer.

After Guerrero identified the clerk, the deputies moved him to the rear of the store. The decoy accompanied them. A photograph was taken of the selling clerk and the decoy at this time. Thereafter, the clerk was issued a citation.

(Findings of Fact II.C.)

Once again, the ALJ considered appellants' arguments, and addressed and rejected them:

The Respondents' [*sic*] also contend that Rule 141, subsection (b) (5) was violated because the clerk was helping a customer when Guerrero identified him as the seller, and therefore could not know he was being identified by the decoy. Respondents' [*sic*] ignore the fact that the decoy and the officers were standing at the sales counter when the identification took place. The decoy was standing right next to the officers when they told the clerk he had sold beer to a minor. Furthermore, the decoy was with the officers when the clerk was taken to a different section of the store to discuss the transaction, and ultimately issue him a citation for the violation. The clerk had his picture taken with the decoy, who was pointing at him and holding the 6-pack of Bud Light beer. (State's Exhibit 2) [*sic*] The clerk had sufficient opportunity to come "face-to-face" with the decoy. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control App. Bd.* (2003) 109 Cal.App.4th 1687) [*sic*] The clerk was aware, or reasonably ought to have been aware, that he was being accused of selling an alcoholic beverage to a minor. There was no evidence presented that he disagreed with or refuted this fact.

(Determination of Issues III.) Accordingly, the ALJ found there was compliance with rule 141(b)(5). (*Ibid.*)

The core objective of rule 141 is fairness to the licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid.*) "It does not require a direct 'face off' or any overt 'acknowledgment' to accomplish these purposes, nor is there a requirement that the officer[s] inform the clerk of the violation prior to his being pointed out by the decoy." (*7-Eleven, Inc./Sawaya* (2014) AB-9364, at pp. 5-6; see also *The Vons Companies, Inc.* (2004) AB-8184 [rejecting appellant's contention that contemporaneous awareness of the clerk at the time the decoy points him out is

required]; *7-Eleven, Inc./Prashar* (2012) AB-9221 [finding compliance with rule 141(b)(5) where the clerk learned he was being identified as the seller after the decoy identified him].)

Here, there was no evidence of misidentification, and the clerk was able to look at the decoy again when the two were photographed together. Additionally, after the clerk was informed that he had sold alcoholic beverages to a minor, he did not deny it. Based on this evidence, it was perfectly reasonable for the ALJ to infer that the clerk was aware, or reasonably ought to have been aware, of the fact that he was being identified as the seller of alcoholic beverages. As above, appellants' contention that the clerk could not have reasonably been aware that he had been identified is pure speculation — the clerk did not testify at the hearing. Altogether, because there is substantial evidence in the record to support the ALJ's determination that there was compliance with rule 141(b)(5) in this case, we cannot upset that determination.

ORDER

The decision of the Department is affirmed.⁵

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.